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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-709

UNITED STATES OF AMERICA *ex rel* DAVID P. WEINBERGER, and DAVID P. WEINBERGER, ESQ., individually,

Petitioners,

versus

EQUIFAX, INC. (formerly Retail Credit Company),

Respondent.

On Petition for a Writ of Certiorari to the United States Fifth Circuit Court of Appeals

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION, U.S. S.Ct. Rule 24.4.

(Printed December 28, 1977)

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REPLY TO POINT I,
Respondent's Brief in Opposition at pp. 5-7.

Since 1960, there have been ten attempts in Congress to modify or repeal the "anti-Pinkerton" statute, 5 U.S.C. § 3108:

Repeal H.R. 11743, 86th Cong., 2d Sess.;
H.R. 7865, 87th Cong., 1st Sess.;
S. 1543, 88th Cong., 1st Sess.;
H.R. 15091, 92d Cong., 2d Sess.;
H.R. 1433, 93d Cong., 1st Sess.;
H.R. 13368, 94th Cong., 2d Sess.

Modification to permit detective agencies to furnish *non-investigative* services:

S. 3224, 89th Cong., 2d Sess.;
S. 2337, 91st Cong., 1st Sess.;
H.R. 11955, 91st Cong., 1st Sess.;
S. 2740, 92d Cong., 1st Sess.

These were being made before, during and after enactment of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq*. Thus respondent's statement at page 6 of his brief in opposition that 5 U.S.C. § 3108 is "obscure and obsolete legislation," particularly in view of recodification of 5 U.S.C. § 3108 into positive law in 1966 [Pub.L. 89-554, 80 Stat. 378, 416], is argument unworthy of this Court's time and attention.

Respondent utterly overlooks the consistency of Comptroller General decisions interpreting the "anti-Pinkerton" statute, except for the one rendered on Jan. 10, 1975 [#B-139965, Respondent's Brief at pp. 1A-16A] which led to this litigation. It was pointed out in the petition for certiorari at pp. 7-8 that the Comptroller General, when writing this decision, did not reveal to Senator Chiles or petitioner Weinberger that his General Accounting Office was a client of respondent. The Comptroller General has issued three more decisions interpreting 5 U.S.C. § 3108 since Jan. 10,

1975. They are lengthy discussions of past opinions, and are entirely consistent with all decisions on the "anti-Pinkerton" statute prior to that date. There is a very good reason why respondent wants to dismiss Comptroller General decisions lightly: *at no time in over 50 years of interpreting the "anti-Pinkerton" statute has the Comptroller General required that a vendor offer "quasi-military" or armed guard services before that act is administratively applied. Application depended upon whether or not the contractor in question was empowered, by other than an omnibus clause in a corporate charter, to furnish INVESTIGATIVE SERVICES without regard to whether it actually rendered them.*

Respondent characterizes the subject matter of the "anti-Pinkerton" statute as "not of great importance." [Brief in Opposition, p. 6.] Very recent national history teaches otherwise, in regard to Government involvement with private investigators.

REPLY TO POINT II,
Brief in Opposition, pp. 7-8.

Respondent well knows that the Court of Appeals ruled petitioner must show direct injury to himself *for the declaratory relief sought* [i.e., invalidity of respondent's Government contracts]. See footnote 3 of the Court of Appeals' opinion, and discussion related thereto, 557 F.2d at 460. Petitioner contends that the cases cited by the Court of Appeals, cited at pp. 15-18 of the petition, actually support his argument for standing as to the declaratory relief sought. Where an informer under the False Claims Act has jurisdiction under 31 U.S.C. § 232(C) on the basis of information

furnished to the Government which it did not previously possess, and has standing to maintain the action by meeting the case law requirement of prosecution of such claim by an attorney, he should have standing to seek a declaration of invalidity of any Government contract in question even if a false claim is not made out for technical reasons. This argument is by no means a reflection of any doubt on petitioner's part that a false claim is present in this case, *infra*.

REPLY TO POINT III,
Respondent's Brief in Opposition at pp. 8-9.

Construction of the False Claims Act by the Court of Appeals was not even necessary, in view of its interpretation of the "anti-Pinkerton" statute. Nevertheless, such construction was contrary to its own precedents and those of this Court, as is shown on pages 15 and 18-25 of the Petition for Certiorari. Respondent is a major corporation with an active, able and growing legal department. Only 12 days after Armed Services Procurement Regulation § 22.108 was promulgated, calling attention to the statutory prohibition on Government hire of detective agencies *for any character of service*, one of respondent's *marketing* rather than *legal* officials represented that its services were proper for the Government and that, even if the prohibition of 5 U.S.C. § 3108 were applicable to the parent (Retail Credit) Company, it would not apply to its subsidiaries. See Appendix herewith, pages 1-A and 2-A. This legal conclusion is faulty, because it ignores two Comptroller General decisions requiring *prima facie separation* between business entities for purposes of interpreting the

Pinkerton prohibition, 41 CompGen 819 (1962), 44 CompGen 819 (1965), and the fact that respondent's subsidiaries are not separate by virtue of financial and other operating consolidation with the parent corporation.

At page 9 of its Brief in Opposition, respondent points to "the gross uncertainty and doubt that the anti-Pinkerton Act applies to Respondent" after conceding at page 4 that "Respondent uses in some cases investigative techniques similar to those employed by detective agencies." In *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47, 55, it was said that

> ". . . Eligibility for payments must be established by the recipient . . . The Government discharges its legal duty to inform by publishing the regulations in the Federal Register . . . *The applicant for public funds has a duty to read the regulations or be otherwise informed of the basic requirements of eligibility* . . ." (e.s.)

Here a substantive federal *statute* is involved, not mere regulations. If respondent was uncertain of the applicability of 5 U.S.C. § 3108, it had a duty to disclose to the Government that it did, in fact, use "in some cases investigative techniques similar to those employed by detective agencies," Brief in Opposition at page 4. The factual questions of precisely what respondent told the Government in obtaining its contracts, and what it knew when it accepted payments on those agreements, govern the applicability of the False Claims Act to respondent. These questions

should have been resolved below if construction of the False Claims Act was appropriate, but never were.

The last paragraph of the Brief in Opposition, at page 9, makes it appear that petitioner Weinberger objected merely to the fact that the trial judge's son was an associate of counsel of record. The Court of Appeals opinion has, unfortunately, completely omitted the real substance of petitioner's complaints to that forum about what went on in the trial court. Petitioner claimed in the Court of Appeals that respondent had misrepresented the tenor of a Comptroller General decision [in its memorandum supporting a motion to dismiss the complaint as amended, R. 95-96; A. 30-31]. Respondent's counsel wrote that

> "Among the latest reported opinions on the Act is B-15361, 44 Comp. Gen. Op. 564, March 18, 1975 [sic-DPW], in which the issue presented was whether the Anti-Pinkerton Act prohibits the Atomic Energy Commission from contracting for protective services with a corporation that is exclusively engaged in providing such services but is a wholly owned subsidiary of a detective agency, namely Wackenhut Corporation. *The Comptroller General ruled that where there existed "at least proforma elements of separate identity, "THE OVERRIDING POLICY CONSIDERATIONS OF THE ACT — PROHIBITION OF THE USE OF DETECTIVES IN LABOR DISPUTES — does not require piercing the corporate veil and prohibiting the proposed contract with the Atomic Energy Commission.'* " (e.s.)

The Comptroller General actually wrote at 44 CompGen 564, 568 that:

> ". . . *whatever may have been the overriding policy considerations* leading to enactment of this legislation some 70 years ago, they do not have much, if any, bearing on the current practice of the Government contracting for guard services of the type here involved." (e.s.)

Respondent ignored the fact that 44 CompGen 819 was not "among the latest reported opinions on the Act" because it was TEN years old, having been published in 1965 and been repeatedly followed thereafter in later decisions. Respondent misled the trial court into holding the "anti-Pinkerton" act applicable only in times of labor disputes. See also R. 67, R. 98. It is worth noting that the Court of Appeals reversed that limited construction, 557 F.2d at 462.

CONCLUSION

If respondent is the *bona fide* consumer reporting agency it claims to be, why is there now fresh evidence of its extensive violation of the Fair Credit Reporting Act? See decision of Administrative Law Judge Theodor P. vonBrand, a 300-page opinion released by the Federal Trade Commission on December 14, 1977, FTC Docket No. 8954, covering a four-year proceeding in which a record of over 16,000 pages of testimony is reportedly involved.

Appellant's principal brief on appeal to the Fifth Circuit Court of Appeals discusses at pp. 52-60 why

the "anti-Pinkerton" and Fair Credit Reporting Acts are not *in pari materia*. They do not regulate exactly the same subject matter. Congress did not understand when enacting the latter that it was opening the door to Government business with detectives so as to repeal the "anti-Pinkerton" act as it had been interpreted by the Comptroller General and codified into positive law. See respondent's denials to Congressional committees as to detective agency status, complaint at pp. 7, R. 7, A. 7. Nor are detective agency and consumer reporting agency status mutually exclusive. The Federal Trade Commission, in its enforcement of the Fair Credit Reporting Act, has applied that law to the "reporting" of detective agencies for insurance and employment purposes.

Respectfully submitted by:

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(Certificate of Service is made by separate affidavit)

11-26-8-22

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JOHN F. HARRIS, ASSISTANT VICE PRESIDENT

November 16, 1971

Mr. Richard J. Richardson
Department of the Army
Defense Supply Service - Washington
Washington, D. C. 20310

Dear Mr. Richardson: Re: SADSS/DLB/OX5-4275
Cont. No. DAHC15 71 C 0295

This letter responds to the questions raised by Captain Knox Cologne in his conversation with our Mr. John Massey on November 16, 1971.

Captain Cologne raised three questions. The answers to these questions are listed below:

1. Retail Credit Company holds the following licenses:

   California - Private Investigator
   New York - Private Investigator
   Florida - Private Investigator
   Delaware - Private Detective
   Connecticut - Private Detective
   Nevada - Private Investigator
   Las Vegas - Private Detective

   These licenses were secured in compliance with state and municipal law and were not subjected to arbitration due to the minimal business expense involved.

2. Retailers Commercial Agency and Credit Bureau, Incorporated of Georgia, are wholly owned subsidiaries of Retail Credit Company. Credit Marketing Services, Incorporated is a wholly owned subsidiary of Credit Bureau, Incorporated of Georgia.

   The Home Office of each firm named above is 1600 Peachtree Street, N. W., Atlanta, Georgia 30309.

Enclosure 1

A DIVISION OF RETAIL CREDIT COMPANY

BEST COPY AVAILABLE

APPENDIX, Page 2-A

3. Our position is that we are not an agency "similar" to Pinkerton and therefore are not covered by 5 USC 3108. Even if a court were to hold Retail Credit Company subject to this section, by no stretch of the imagination would the subsidiaries be brought under it.

Please let us know should you or Captain Cologne require any additional information.

Yours truly,

John F. Harris
Assistant Vice President

JFH:BLL